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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 556

CARL R. ANDERSON and GERRITT A. GATES,

Petitioners,

VS.

EMPIRE SEAFOODS, INC. and CLEARY BROS. CONSTRUCTION COMPANY

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, CLEARY BROS. CONSTRUCTION COMPANY IN OPPOSITION

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CITATION OF OPINIONS

The opinion of the Court of Appeals for the Fifth Circuit dated March 18, 1968 (Pet. App. 1a-23a), the Modification of Opinion dated June 27, 1968 (Pet. App. 23a-25a), Order on Petition for Rehearing en banc (Pet. App. 26a) have now been reported at **Empire Seafoods, Inc. v. Anderson,** 398 F 2d 204, 5th Cir., 1968.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Respondent, dissatisfied with the question presented by petitioners, will discuss petitioners' question in respondent's argument. Respondent's position is that the proper question to be raised in a review of this case is as follows:

> Whether an employee can recover directly from his employer in the absence of underlying liability through the application of the admiralty rule of divided damages in a collision case?

RESPONDENT'S STATEMENT OF THE CASE

Empire Seafoods, Inc. (Empire) was the owner of a shrimp vessel called the "BORA BORA". Cleary Brothers Construction Company (Cleary) was a contractor building a bridge for the State of Florida over the Intracoastal Waterway. Anderson and Gates were employees of Cleary and members of a steel gang working on the bridge. Anderson was the supervisor of the work. On August 28, 1963, the "BORA BORA" southbound in the Intracostal Waterway collided with the bridge resulting in injuries to Anderson and Gates.

The case involves a decree for damages for personal injuries entered in favor of Petitioners Anderson and Gates by the United States District Court for the Southern District of Florida, in Admiralty, and against Empire, and a decree rendered in favor of Empire on its impleading petition against Cleary for one-half of any and all sums paid by Empire to either claimant (Petitioners herein).

PROCEEDINGS IN THE DISTRICT COURT

Empire, as owners of the "BORA BORA", filed a petition for exoneration from or limitation of liability pursuant to the provisions of 48 U.S.C. 183-184 (R 726). Anderson and Gates answered the petition (R 737, 745) and filed claims therein (R 752, 755). Empire impleaded Cleary pursuant to Admiralty Rule 56 seeking indemnity from Cleary (R 764). Cleary answered Empire's impleading petition asserting the Florida Workmen's Compensation Statute, (**Fla. Stat.** ch. 440) as a bar to a claim of indemnity by Empire (R 793). Cleary answered the claims of Anderson and Gates (R 791). Empire filed a cross libel against Anderson (R 770).

After trial, the district court entered findings of fact and conclusions of law which found: (1) fault on the part of Empire (R 838-839), (2) fault on the part of Cleary (R 839, 840), (3) fault on the part of Anderson and Gates for which Cleary was held vicariously liable (R 841) and (4) fault on the part of Anderson and Gates contributing to their own injury to the extent of 20% (R 842, 843).

Anderson and Gates moved for entry of a final decree which would have provided for the recovery of all their damages directly from Empire in the total sum of

$194,112.86 ($168,413.76 for Anderson, and $25,536.40 for Gates, a mathematical error having been made in the computation). The proposed decree also provided for the recovery by Empire by way of indemnity from Cleary of the sum of $97,056.43 (R 846-848). The motion was denied (R 849). The court entered its final decree (R 851) providing for recovery by Anderson and Gates of all their damages from Empire, and for recovery by Empire on its impleading petition from Cleary of one-half of all sums paid by Empire to either petitioner.

PROCEEDINGS ON APPEAL

On appeal to the Court of Appeals for the Fifth Circuit, Anderson and Gates attacked the decree of the District Court assigning as error the denial of their motion for entry of the decree as proposed by them.[1]

In its original opinion the court of appeals went even further than Anderson and Gates had urged. Citing **Weyerhaeuser S.S. Co. v. United States,** 1963, 372, U.S. 597, the court applied the collision damage rule as calling for direct recovery by Anderson and Gates of one-half their total damage from Empire and one-half from Cleary.

Cleary filed a petition for rehearing in the circuit court of appeals suggesting the court did not take into consideration the lack of underlying liability from Cleary to Anderson

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[1]From a Brief on behalf of Appellants Carl R. Anderson and Gerritt A. Gates Appeal from the United States District Court for the Southern District of Florida.

SPECIFICATION OF ERRORS

"The Court erred in denying the motion of Claimants [Anderson and Gates] for entry of a decree in a form allowing the Petitioner [Empire] judgment against the Impleaded-Respondent [Cleary] in the definite amount of one-half the damages Petitioner sustained without qualifications."

and Gates and improperly applied the divided damage rule to allow their direct recovery from Cleary.

The Court of Appeals granted the petition for rehearing, modified its opinion accordingly and said at 398 F. 2d 217:

> "But where a statute such as the Florida Workmens' Compensation Act here, the Federal Employer's (sic) Compensation Act in **Weyerhaeuser S.S. Co. v. United States,** 1963, 372 U.S. 597, and the Harter Act in **The Chattahoochee,** 1899, 173 U.S. 540, denies direct recovery against one of the two vessels (Cleary, the employer of Anderson and Gates), recovery can be had only against the other vessel for all of the damages sustained by the innocent party. **Aktieselskabet Cuzco v. The Sucarseco,** 1935, 294 U.S. 394, 55 S. Ct. 467; **United States v. Atlantic Mutual Ins. Co.,** 1952, 343 U.S. 236, 72 S. Ct. 666; **New York and Cuba Mail S.S. Co. v. American S.S. Owners' Mut. P & I Ass'n, Inc.,** 2 Cir. 1934, 72 F. 2d 694."

A Petition by Anderson and Gates for rehearing en banc was denied, 398 F. 2d 218.

ARGUMENT

The Circuit Court of Appeals properly decided the questions involved and applied the divided damage rule in accord with applicable decisions of this Court.

The admiralty rule of divided damages in mutual fault collision cases was fully explained by this court as early as 1876 in **The Atlas,** 93 U. S. 302, 316.

"Common law remedies in cases of tort, as given in common law courts, and suits in personam in the admiralty courts of this country, bear a strong resemblance to each other in respect to parties, and the effect of a recovery by the injured party against one or all of the wrongdoers and the extent of redress to which an innocent party is entitled against the wrongdoer. **Simpson v. Hand,** 6 Whart; 321.

* * *

"Contributory negligence on the part of the libelant cannot defeat a recovery in collision cases, if it appears that the other party might have prevented the disaster, and that he also did not practice due diligence, and was guilty of negligence, and failed to exercise proper skill and care in the management of his vessel. Proof of the kind will defeat a recovery at common law; but the rule in the admiralty is, that the loss in such a case must be apportioned between the offending vessels, as having been occasioned by the fault of both; but the rule of the common law and of the admiralty is the same where the suit is promoted by an innocent party, except that the moiety rule may be applied in the admiralty, if all the parties are before the court, **and each of the wrongdoers is liable to respond for his share of the damage.** Subject to that qualification, the remedy of the innocent party is substantially the same in the admiralty as in an action at law, the rule being, that in both he is entitled to an entire compensation from the wrongdoer for the injury

suffered by the collision. **Colegrove v. R. Co.,** 20 N.Y. 493; **Cattlin v. Hills,** 8 C.B. 125; **Vanderplank v. Miller,** 1 Mood. & M. 169.

* * *

"Innocence entitles the loser to full compensation from the wrongdoer, and it is a good defense against all claims from those who have lost. Individual fault renders the party liable to the innocent loser, and is a complete answer to any claim made by the faulty party, except in a case where there is mutual fault, in which case the rule is that the combined amount of the loss shall be equally apportioned between the offending vessels." [Emphasis added]

In **The Atlas** the court accepted the principle that in such a controversy, the innocent party had an action at law against the mutual wrongdoers, 93 U.S. 315. But where a statute, **Weyerhaeuser S.S. Co. v. United States,** 1963, 372 U.S. 597; **The Chattahoochee,** 1899, 173 U.S. 540; or a contract, **Erie R.R. Co. v. Erie & Western Transportation Co.,** 1907, 204 U.S. 220, denies direct recovery against one of two vessels, recovery can only be had against the other vessel for all of the damages sustained by the innocent party. **Aktieselskabet Cuzco v. The Sucarseco,** 1935, 294 U.S. 394; **United States v. Atlantic Mutual Ins. Co.,** 1952, 343 U.S. 236; **New York & Cuba Mail S.S. Co. v. American S.S. Owners' Mut. P & I Ass'n, Inc.,** 2 Cir., 1934, 72 F. 2d 694.

Cleary, a Florida contractor, building a bridge in the State of Florida, was, as well as its employees, Anderson

and Gates, subject to the Florida Workmen's Compensation Act. **Fla. Stat.** ch. 440.11, 1967, which provides:

> "Exclusiveness of liability. The liability of an employer prescribed in § 440.10 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter an injured employee, or his legal representative, in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

Anderson and Gates were construction workers engaged in non-maritime work erecting a bridge. They were not seamen, they were not longshoremen as in **Reed v. S.S. Yaka,** 1963, 373 U.S. 410 and **Jackson v. Lykes Bros.** S.S. Co., 1967, 386 U.S. 731, nor were they shoreside or other workers, doing work traditionally that of seamen as in **Pope & Talbot, Inc. v. Hawn,** 1953, 346 U.S. 406 affording them a warranty of seaworthiness with its admiralty right to recover for its breach. Their right to recover was

not based upon principles peculiar to the maritime law but on the traditional principles of negligence law.

The Admiralty Jurisdiction Act (Extension) 46 U.S.C. §740 was not intended to create any new causes of action. See **Legislative History,** 1948 **U.S. Code Congressional & Administrative News,** pp. 1888, 1889.

The cases cited by petitioners have no application here for they do not involve collision cases between two vessels mutually at fault. Therefore, the application of the divided damage rule is not in point.

In **Southern Pacific Co. v. Jensen,** 1916, 244 U.S. 205, the court was concerned with an out of state shipowners obligation to comply with the compensation laws of the State of New York.

In **Southern Pacific Co. v. Jensen, supra; The Linseed King,** 1932, 285 U.S. 502; **Reed v. S.S. Yaka,** 1963, 373 U.S. 410; and **Jackson v. Lykes Bros. S.S. Co.,** 1967, 386 U.S. 731, the employer in each case had a dual capacity as employer and shipowner. In each case the Court dealt with the defendants duties as a shipowner as distinguished from his duties as an employer.

The Court in **Weyerhaeuser,** supra, was concerned with "...the correlative rights and duties of the shipowners whose vessels have been involved in a collision in which both were at fault." 372 U.S. 597. Both the district court and the circuit court on rehearing applied the same rule to determine the right of Empire to contribution or indemnity from Cleary.

"... Empire's right to contribution is not due to Cleary's liability to Anderson and Gates but to Cleary's liability to Empire. In the division of damages between Empire and Cleary, mutually at fault in this collision, Empire, who must pay the damages to Anderson and Gates, may treat these damages as part of its own collision damages and recover from Cleary one-half the amount it pays Anderson and Gates." 398 F. 2d 204, 218.

The application of the admiralty rule of divided damages in collision cases in the manner provided by the District Court and the Court of Appeals is in accord with **The Chattahoochee,** 1899, 173 U.S., 540, **Aktieselskabet Cuzco v. The Sucarseco,** 1935, 294 U.S. 394, **United States v. Atlantic Mutual Ins. Co.,** 1952, 343 U.S. 236, and **Weyerhaeuser S.S. Co. v. United States,** 1963, 372, U.S. 597.

CONCLUSION

It is submitted that the Court of Appeals properly decided the questions involved and applied the divided damage rule in accord with applicable decision of this Court. The petitioners having failed to show any conflict with the decisions of this Court, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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